

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Nov 13, 2024**

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CHARLES BOURG and DEBORAH  
LYNN BRINSON, individually and as a  
marital community,

Plaintiffs,

v.

UNITED STATES OF AMERICA;  
ORACLE HEALTH GOVERNMENT  
SERVICES, f/k/a CERNER  
GOVERNMENT SERVICES, INC.; and  
CERNER CORPORATION,

Defendants.

No. 2:23-CV-00348-SAB

**ORDER DENYING  
DEFENDANT UNITED STATES'  
MOTION TO DISMISS SECOND  
AMENDED COMPLAINT**

Before the Court is the United States of America's Motion to Dismiss Second Amended Complaint, ECF No. 60. Plaintiffs are represented by George Ahrend, J. Andrew Hoyal, Mark Kamitomo, and Robert Gellatly. Defendant United States is represented by Derek Taylor, John Drake, and Martin St. Aubin. Defendant Cerner is represented by Dean Baxtresser, Dylan Glenn, Mary Alexander, Robin Hulshizer, and Vanessa Soriano Power. Defendant Oracle Health Government Services is represented by Dylan Glenn and Vanessa Soriano Power. The motion was considered without oral argument.

Having reviewed the briefs, caselaw, and relevant statutes, the Court **denies** the United States' motion to dismiss.

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**ORDER DENYING DEFENDANT UNITED STATES' MOTION TO  
DISMISS SECOND AMENDED COMPLAINT \* 1**

## BACKGROUND

This case was filed on December 1, 2023, in the Eastern District of Washington. On May 15, 2024, the Court granted Defendant the United States' Motion to Dismiss for Lack of Jurisdiction. On July 19, 2024, the Court granted Plaintiffs' Motion to Alter Judgment and Amend/Correct their Complaint to allow Plaintiffs to reassert claims against the United States.

Plaintiffs filed their Second Amended Complaint on July 29, 2024. Against Defendant the United States and through the Federal Tort Claims Act ("FTCA"), Plaintiffs bring state-law claims of Medical Negligence, Negligence, and Vicarious Liability. Against Cerner Corporations, Plaintiffs bring claims for Products Liability – Design Defect, Product Liability – Manufacturing Defect, Product Liability – Failure to Warn, and Negligence.

Mr. Bourg is a veteran who received care at the Mann-Grandstaff VA Medical Center in Spokane. In December 2020, Mr. Bourg underwent a routine prostate exam, which revealed elevated prostate-specific antigen (PSA) levels in his blood and indicated possible cancer. On December 7, 2020, Mr. Bourg's primary care provider Physician Assistant Leann Bach, sent a secure message through a new electronic health record system (EHR) requesting a consult from urology provider Physician Assistant Robert Bond. Both Bond and Bach were employees at Mann-Grandstaff. On December 8, 2020, Bond placed a "return to clinic" order to schedule a follow-up appointment for Mr. Bourg. The EHR system failed to send the order to the proper portal, and no follow-up was scheduled.

In April 2021, Mr. Bourg again visited Bach, who sent another message to urology. Bach again sent a "return to clinic" order. This order went to the correct portal but altered the appointment to schedule it four months later than ordered. In August 2021, Mr. Bourg inquired about his appointment, which eventually occurred in September 2021. He had a subsequent biopsy in October 2021 and was diagnosed with cancer. After a January 2022 surgery, doctors discovered the

1 cancer had metastasized. Mr. Bourg was diagnosed with terminal cancer.

2 The Department of Veterans Affairs (“VA”) contracted with Defendant  
3 Cerner Corporation for the EHR system in 2018. It went live at Mann-Grandstaff  
4 on October 24, 2020. The EHR system was designed, manufactured, and  
5 implemented by Cerner.

6 On or about December 7, 2022, and with the assistance of legal counsel,  
7 Plaintiffs filed a Standard Form 95 Claim with the VA Office of General Counsel,  
8 Torts Law Group in Washington, D.C.; the United States Attorney for the Eastern  
9 District of Washington in Spokane; and the Mann-Grandstaff VA Medical Center  
10 in Spokane. The Basis of the Claim stated:

11 Brief Factual Overview:

12 Claimant had a routine prostate screening sometime in December of  
13 2020. Based on this screening, a urology provider attempted to place a  
14 request for a follow-up appointment with Claimant through the  
15 Veteran Administration’s new Electronic Health Record’s (HER)  
system. This system did not process that request.

16 In approximately April of 2021, Claimant’s primary care provider  
17 became aware that Claimant had not seen a urologist and attempted to  
18 send another message through the EHR system. An appointment  
19 appears to have been made at this time, however the system appears to  
20 have modified the appointment from May 5, 2021 to September 21,  
21 2021. Subsequent to this appointment, Claimant underwent a biopsy  
22 in October of 2021. Subsequent to this biopsy, Claimant was  
23 diagnosed with cancer and underwent surgical removal of his prostate  
24 in January of 2022. Claimant’s cancer metastasized and is terminal.

25 Legal Basis:

26 The VA’s HER system and/or the system used for referral’s and  
27 appointment scheduling caused a delay in Claimant’s treatment. This  
28 delay in treatment was a proximate cause of the growth and metastatic  
spread of Claimant’s cancer.

1 The VA failed to make a final determination within six months of service,  
2 and pursuant to 28 U.S.C. § 2675(a), the Plaintiffs filed this matter.

### 3 MOTION STANDARD

4 Fed. R. Civ. P. 12(b)(1) allows for dismissal of an action for “lack of  
5 subject-matter jurisdiction,” and a federal court must establish subject-matter  
6 jurisdiction to hear a case. *Lightfoot v. Cendant Mortg. Corp.*, 580 U.S. 82, 92  
7 (2017). Plaintiff bears the burden of proving the existence of such jurisdiction  
8 when considering a Rule 12(b)(1) motion. *See Thompson v. McCombe*, 99 F.3d  
9 352, 353 (9th Cir. 1996). The presumption in federal court is no jurisdiction unless  
10 otherwise proven. *See Gen. Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968,  
11 968–69 (9th Cir. 1981). At any point if the court finds it lacks subject matter  
12 jurisdiction, it must dismiss the case. Fed. R. Civ. P. 12(h)(3).

13 A subject-matter jurisdiction challenge is either facial—the allegations are  
14 insufficient on their face—or factual—the facts of the allegations that give rise to  
15 jurisdiction are disputed. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A  
16 facial challenge requires the court to assess whether the allegations in the  
17 complaint are legally sufficient to invoke the court’s jurisdiction. *See Salter v.*  
18 *Quality Carriers, Inc.*, 974 F.3d 959, 964 (9th Cir. 2020).

### 19 USA’S MOTION TO DISMISS FOR LACK OF JURISDICTION

#### 20 a. Legal Standard

21 The federal government enjoys immunity from suit, except in cases like the  
22 FTCA where it has waived sovereign immunity under a *respondeat superior*  
23 theory. *See Blackburn v. United States*, 100 F.3d 1426, 1429 (9th Cir. 1996). To  
24 bring a claim in federal court seeking damages under the FTCA, a plaintiff must  
25 first satisfy the presentment requirement pursuant to 28 U.S.C. § 2675(a):

26 (a) An action shall not be instituted upon a claim against the United  
27 States for money damages for injury or loss of property or personal  
28 injury or death caused by the negligent or wrongful act or omission of

any employee of the Government while acting within the scope of his office or employment, **unless the claimant shall have first presented the claim to the appropriate Federal agency** and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(emphasis added).

If a claim is not properly presented to the appropriate agency first, the district court must dismiss it for lack of subject matter jurisdiction. *See Goodman v. United States*, 298 F.3d 1048, 1054–55 (9th Cir. 2002). The filing need not be extensive and requires “minimal notice” that “(1) give[s] an agency sufficient written notice to commence investigation and (2) place[s] a value on the claim.” *Warren v. U.S. Dep’t of Interior Bureau of Land Mgmt.*, 724 F.2d 776, 779 (9th Cir. 1984) (en banc).

“A plaintiff’s administrative claims are sufficient even if a separate basis of liability arising out of the same incident is pled in federal court.” *Goodman*, 298 F.3d at 1055. Further, a claimant need not state the legal theory for recovery. *See Rooney v. United States*, 634 F.2d 1238, 1242 (9th Cir. 1980).

#### **b. Analysis**

In the Court’s previous Order granting the United States’ motion to dismiss, the Court found for the United States because Plaintiffs failed in their Complaint to identify specific employees who caused harm, as required by the FTCA and as stated in 28 U.S.C. § 1346(b)(1). *See F.D.I.C. v. Meyer*, 510 U.S. 471, 477 (1994).

Plaintiffs filed a Second Amended Complaint, and the United States again challenges this Court’s jurisdiction under the FTCA, this time for failure to properly present the FTCA claim for medical negligence as required by § 2675(a).

**ORDER DENYING DEFENDANT UNITED STATES’ MOTION TO DISMISS SECOND AMENDED COMPLAINT \* 5**

1 In their Standard Form 95 filed with the VA, Plaintiffs alleged the “delay in  
2 treatment” proximately caused Mr. Bourg’s cancerous growth. Plaintiffs have  
3 sufficiently met the Rule 12(b)(1) standard because their statement provides the  
4 United States “sufficient written notice to commence investigation” into the  
5 medical providers and to satisfy § 2675(a) presentment for their claims. *Warren*,  
6 724 F.3d at 779.

7 As such, the Court denies the United States’ motion to dismiss. The  
8 allegations, on their face, are legally sufficient to invoke the Court’s jurisdiction.  
9 *See Salter*, 974 F.3d at 964.

10 Accordingly, **IT IS HEREBY ORDERED:**

11 1. The United States of America’s Motion to Dismiss Second Amended  
12 Complaint, ECF No. 60, is **DENIED**.

13 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter  
14 this Order and to provide copies to counsel.

15 **DATED** this 13th day of November 2024.



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A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

22 Stanley A. Bastian  
23 Chief United States District Judge  
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